In the Supreme Court of the United States

October Term, 1945.

MISSION STATE BANK, a Corporation, *Petitioner,*

vs.

CHARLES EUGENE SPURGEON, by his next friend, Thomas L. Brown, *Respondent.*

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Opinions Below.

The memorandum opinion on motion to remand delivered by the District Court per Reeves, J., May 27, 1943 (Appendix A), appears at pages 26-32 of the record and is reported at 55 Fed. Supp. 305.

The opinion of the Circuit Court of Appeals, Eighth Circuit, delivered November 6, 1945, per Riddick, J. (Appendix B), appears at pages 52-49 of the record and is reported at 151 Fed. (2d) 762.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Appeals, Eighth Circuit, on writ of certiorari, is invoked under Section 240 (a) of the Judicial Code, as amended June 7, 1934, c. 246, 48 Stat. 926, 28 U. S. C. A. Sec. 347, and Rule 38 of the Supreme Court of the United States as effective February 27, 1939. The opinion of the Circuit Court of Appeals was delivered November 6, 1945 (42), and the petition for rehearing was denied December 3, 1945 (59). This petition for review on writ of certiorari is filed within three months of either date and is therefore timely filed. 48 Stat. 926, 28 U. S. C. A. Sec. 350.

SUMMARY STATEMENT.

January 23, 1943, Charles Eugene Spurgeon, a minor, by next friend, filed his action for damages for false imprisonment against the petitioner, Mission State Bank, in the Circuit Court of Jackson County, Missouri, at Kansas City (2-7). The bank, a Kansas corporation and citizen and resident of that state, in due time filed its petition for removal to the United States District Court (6-8), alleging that plaintiff minor was a citizen and resident of Missouri, so that necessary diversity of citizenship existed. Bond was filed, and an order of removal was entered by the state court (9). Transcript on removal was duly lodged in the District Court (10), and the bank then answered (10-11).

April 16, 1943, plaintiff filed his motion to remand (11-12) in which he alleged that he, as well as the bank, was citizen and resident of Kansas, and that no diversity of citizenship existed between them. The motion was heard before District Judge Reeves. We briefly summarize the testimony before the District Court on the hearing:

Plaintiff Charles Eugene Spurgeon, hereinafter referred to as the minor, was born July 2, 1924. His parents resided near Queen City in Schuyler County, Missouri. His father died in 1926. Six years later his mother remarried, becoming Sarah Catherine Ballanger, and she continued to reside in Schuyler County. In December, 1942, the minor, then about 18 years old, left his mother's home and went to Kansas City, Missouri, to seek employment (15-16). His mother had nothing to do with his leaving home, she did not ask him to leave, nor did she want him to leave (17).

On reaching Kansas City, Missouri, the minor took board and lodging at the home of a Mrs. Poindexter. He had no extra clothes with him. He told Mrs. Poindexter he expected to be drafted at any time. He obtained employment at the Dickinson Theatres at Mission, Kansas, a close-in suburb of Kansas City, Missouri, and commuted back and forth until January 10, when he left Mrs. Poindexter's home (25).

January 2, 1943, the minor was arrested while in the bank, and was later released. He claimed that on January 10, 1943, he moved his residence to Mission, Kansas, with the intent to become a citizen and resident of that state (13). He slept in a small, unfurnished room in the theatre building from January 10, 1943, until March of that year when he was inducted (25).

The minor contended that the evidence showed he had been emancipated, so that he was legally capable of acquiring a domicile of choice, separate and apart from the domicile of his parents. The bank contended that under the law of Missouri, no minor, whether emancipated or not, could acquire a domicile of his own choice so long as either parent lived, and, further, that complete emancipation was not shown.

The District Court, in an able memorandum opinion (26-36), 55 Fed. Supp. 305 (Appendix "A"), held that as a matter of fact, complete emancipation was not shown, and ruled that the minor, being *sui non juris*, could not acquire a separate domicile on his choice under the law of Missouri, and the motion to remand was denied (32).

The cause proceeded to trial and plaintiff minor recovered judgment for actual and punitive damages (33-34). His appeal to the Circuit Court of Appeals, Eighth Circuit, in which he complained solely of jurisdiction of the District Court, followed, and that court, in its opinion (42-49) (Appendix B) held that on the record, emancipa-

tion was shown as a matter of law and, ruling the case solely on the authority of foreign jurisdiction, held that the minor was legally capable of acquiring, and had acquired, a separate domicile of his own choice in Kansas, and that no diversity of citizenship existed. The Eighth Circuit reversed the cause with instructions to remand to the state court. After unavailing petition for rehearing (51-58), the bank presents this petition for review of the decision of the Eighth Circuit, on writ of certiorari.

SUMMARY OF ARGUMENT.

I.

The common law of England as of the year 1607 is the common law of Missouri.

Robertson v. *Jones et al.*, 345 Mo. 826, 136 S. W. (2d) 278, 279;
Lines Music Co. v. *Holt et al.*, 332 Mo. 749, 60 S. W. (2d) 32, 34;
Sec. 645, R. S. Mo. 1939.

II.

The common law of Missouri, as adopted by it, continues to be the common law of that state unless abrogated by statute or constitution.

Robertson v. *Jones et al.*, 345 Mo. 826, 136 S. W. (2d) 278, 279;
Lines Music Co. v. *Holt et al.*, 332 Mo. 749, 60 S. W. (2d) 32, 34;
Davis v. *Stouffer*, 132 Mo. App. 55, 112 S. W. 282, 286.

III.

Under the common law as adopted and in force in Missouri, the domicile of a minor is the domicile of his parents, and no minor whose parents are living can acquire a separate domicile of his own choice.

Lamar v. *Micou*, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751;
Delaware, L. & W. R. Co. v. *Petrowsky*, 162 C. C. A. 570, 250 Fed. 554, Cert. denied 247 U. S. 508, 38 S. Ct. 427, 62 L. Ed. 1241;
Bjornquist v. *Boston & A. R. Co.*, 163 C. C. A. 179, 250 Fed. 929, 5 A. L. R. 951;

Ex Parte Petterson, 166 Fed. 536, 545;
Marks v. *Marks,* 75 Fed. 321, 325, 5 A. L. R. 943, 960;
Wiggins v. *New York Life Ins. Co.,* 2 F. Supp. 365;
Trammell v. *Kansas Compensation Board,* 142 Kans. 329, 46 Pac. (2d) 867;
Modern Woodmen v. *Hester,* 66 Kans. 129, 71 Pac. 379;
Jacobs, "Law of Domicile," (1887) Secs. 229, 231.

IV.

Under the common law as in force in Missouri, even an emancipated minor is without legal capacity to establish a domicile of choice.

Delaware L. & W. R. Co. v. *Petrowsky, supra;*
Gulf C. & S. F. R. Co. v. *Lemons,* 109 Tex. 244, 206 S. W. 75, 5 A. L. R. 943;
Bjornquist v. *Boston and A. R. Co., supra;*
Ex Parte Petterson, 166 Fed. 536;
Jacobs, "Law of Domicile" (1887), Sec. 231.

V.

In ruling the question of the minor's domicile, it was the duty of the Circuit Court of Appeals to decide that issue under the common law of Missouri, and it was error for that court to decide the issue on the law of foreign jurisdictions or "modern authorities" as perceived by that court.

Erie R. Co. v. *Tompkins,* 304 U. S. 64, 58 S. Ct 817;
Magnolia Petroleum Co. v. *Hunt,* 320 U. S. 430, 445, 64 S. Ct. 208, 88 L. Ed. 168.

VI.

The District Court's findings that complete emancipation did not exist are supported by substantial, competent evidence, and it was error for the Circuit Court of Appeals to brush such findings aside, since clear error was not shown.

Hazeltine Corp. v. *General Motors Corp.*, (C. C. A. 3) 131 F. (2d) 34;
Reinstine v. *Rosenfield*, (C. C. A. 7) 111 F. (2d) 892;
Rule 52, Federal Rules of Civil Procedure;
Cleo Syrup Corp. v. *Coca-Cola Co.*, 139 F. (2d) 416, 150 A. L. R. 1056, Cert. denied 64 S. Ct. 638, 321 U. S. 781.

VII.

The petition for writ of certiorari to the Circuit Court of Appeals, Eighth Circuit, should be allowed.

Erie R. Co. v. *Tompkins, supra;*
Magnolia Petroleum Co. v. *Hunt, supra.*

ARGUMENT.

The common law of England was first adopted in Missouri by an Act of the Third Territorial Assembly, approved January 19, 1816, and has been in effect since that date. Missouri's adoption of the common law was re-enacted from time to time and carried forward into what is now Section 645, Revised Statutes of Missouri, 1939, II Missouri Statutes Annotated, page 87. That section reads:

> "The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such common law, or with such statutes or acts of parliament; but all such acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof. R. S. 1929, Sec. 645."

The Missouri courts have held that the common law of England prior to the fourth year of the reign of James the First, the year 1607, is the common law of Missouri, and remains in force, as adopted, unless changed by statute or constitution. In *Robertson* v. *Jones et al.*, 345 Mo. 826, 136 S. W. (2d) 278, 279, the Supreme Court of Missouri said:

> "It is true the common law of England, so far as it is applicable, is in force in this state except where changed by statute."

In *Lines Music Co.* v. *Holt et al.*, 332 Mo. 749, 60 S. W. (2d) 32, 34, the court said:

> "The common law is the law of our land unless abrogated by statute or constitution."

Changes in the common law of England made after the year 1607 are not binding on or followed by the courts of Missouri, as held by the Kansas City Court of Appeals in *Davis* v. *Stouffer*, 132 Mo. App. 55, 112 S. W. 282. There the plaintiff asserted that she had entered into a valid common-law marriage with Dr. Joseph B. Davis, and brought suit as his widow. The defense contended that in 1844 an authoritative announcement was made by the English courts in the case of *Reg.* v. *Millis*, 10 Clark & Fin. 534, holding that it had never been the common law of England that a marriage could take place except in a limited degree, without being regularly solemnized according to ecclesiastical law; that is, by certain church formalities. This defense was rejected by the Kansas City Court of Appeals, which said (l. c. 286):

> "But *Reg.* v. *Millis* does not state the common law of England as it was understood to be by the courts and Legislatures of this country when it was introduced here. *Dyer* v. *Brannock, supra; Hallett* v. *Collins*, 10 How. (U. S.) 174, 13 L. Ed. 376. It may safely be said that the courts of this country are not under any obligation to follow the mutations of decisions or new views announced in England as to what was the law of that country."

We have therefore established that the common law of England of the year 1607 is the common law of Missouri, that the common law of Missouri cannot be changed except by statute or by constitution, and that mutations in the common law of England made after the year 1607 are of no effect in Missouri and are not binding upon its courts.

Under the common law of England, as adopted in Missouri, a minor could not change his domicile by his own act. The rule is stated by Jacobs in his Law of Domicile (1887) in Section 229:

> "*Domicile of infant cannot be changed by his own act.*—And First, it cannot, at least ordinarily, be changed by his own act. Infants are deemed in law to be wanting in discretion, and, therefore, without capacity to form the intention requisite for the establishment of a domicil of choice. Hence, it results that until they arrive at such age as is deemed by the particular law to which they are subject sufficient for the attribution to them of capacity to choose and act for themselves, they must either retain the domicil which they received at birth, or must depend upon other persons for a change of domicil. Indeed, it has been laid down by a good authority as the undisputed position of all jurists that a minor cannot of his own accord, or—to use the expression of Bynkershoek —*proprio marte,* change his domicil. This is undoubtedly the general rule, and it cannot be said that

there are in the law as understood and administrated in England and America any well-established exceptions."*

No Missouri statute has changed the common law rule. No Missouri courts have ruled the issue here presented and so the rule in Missouri remains the common law rule quoted above and which has found expression in many cases in addition to those cited by Jacobs. Before turning to other cases which announce the rule, we call attention to the fact that in *Lamar* v. *Micou*, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751, cited by Jacobs, this Court said, l. c. 470:

"An infant cannot change his own domicil."

In *Delaware L. & W. R. Co.* v. *Petrowsky*, 255 Fed. 554, 162 C. C. A. 570, certiorari denied 247 U. S. 508, 38 S. Ct. 427, 62 L. Ed. 1241, the Second Circuit said:

"The law is well established that every person at his birth acquires a domicile of origin, which is that of the person on whom he is legally dependent, which in the case of a legitimate child is that of its father, and in the case of an illegitimate child is that of its mother.

*Citing: *Somerville* v. *Somerville*, 5 Ves. Jr. 750; *Forbes* v. *Forbes*, Kay, 341; *Douglas* v. *Douglas*, L. R. 12 Eq. Cas. 617; *Lanenville* v. *Anderson*, 2 Spinks 41; *Lamar* v. *Micou*, 112 U. S. 452; *Hart* v. *Lindsey*, 17 N. H. 235; *Woodworth* v. *Spring*, 4 Allen 321; *Ames* v. *Duryea*, 6 Lans. 155; *Ex Parte Dawson*, 3 Bradf. 130; *Seiter* v. *Straub*, 1 Demarest 264; *Blumenthal* v. *Tannenholz*, 31 N. J. Eq. 144; *Guier* v. *O'Daniel*, 1 Binn. 349, Note; *School Directors* v. *James*, 2 Watts & S. 568; *Re Lower Oxford Township Election*, 11 Phil. 641; *Harkins* v. *Arnold*, 46 Ga. 656; *Metcalf* v. *Lowther's Ex'rs*, 56 Ala. 312; *Mears* v. *Sinclair*, 1 W. Va. 185; *Hiestand* v. *Kuns*, 8 Blackf. 345; *Warren* v. *Hofer*, 13 Ind. 169; *Maddox* v. *The State*, 32 Id. 111; *Freeport* v. *Supervisors*, 41 Ill. 495; *Rue High, Appellant*, 2 Dougl. (Mich.) 515; *Allen* v. *Thomason*, 11 Humph. 536; *Grimmett* v. *Witherington*, 16 Ark. 377; *Johnson* v. *Turner*, 29 Id. 280; *Powers* v. *Mortee*, 4 Am. L. Reg. 427; *Hardy* v. *De Leon*, 5 Tex. 211; *Russell* v. *Randolph*, 11 Id. 460; *Trammell* v. *Trammell*, 20 Id. 406; Phillimore, Dom. loc. cit.; Dicey, Dom. p. 106; Story, Confl. of L., Sec. 46; Pothier, Intr. Aux. Cout. d'Orleans, No. 16.

"The general rule is also well established that a person while a minor, being *non sui juris,* cannot change his or her domicile."

In *Marks* v. *Marks,* 75 Fed. 321, 325, the Court said:

"Infants cannot change their own domicile. Their domicile is that of their parents. If the father be living the domicile of an infant and that of its mother follow the domicile of the father, unless the husband and wife be separated. After the death of the father the domicile of the infant is that of the mother."

In *Bjornquist* v. *Boston & A. R. Co.,* 250 Fed. 929, 163 C. C. A. 179, 5 A. L. R. 951, the Court said:

"It is undoubtedly true that the general rule is that a minor is incapable of changing his domicile and acquiring a new one during his minority; that he has the domicile of his father if living, and if he is dead, that of the mother, etc. * * *

"The reason stated for the general rule is that a minor is *non sui juris,* which, no doubt, as here applied, means that a person who is under the power and authority of another possesses no right to choose a domicile. *Hart* v. *Lindsey,* 17 N. H. 235, 43 Am. Dec. 597. Under the common law the father is the natural guardian of the minor, and entitled to his custody and control until he reaches majority; and the same is true of the mother (the father having died)."

The opinion of the Circuit Court of Appeals, Eighth Circuit, conflicts with all the above cases.

We have thus established that at common law, a minor could not acquire a domicile of choice so long as either parent lived. We come now to the question of emancipation, and the effect, if any, of emancipation on the minor's

right to acquire a domicile of choice at common law. Before the District Court, and again before the Circuit Court of Appeals for the Eighth Circuit, the respondent contended that he had been completely emancipated and was therefore capable of acquiring a domicile of choice. We contended that the question of emancipation need not be considered, because at common law no minor, not even an emancipated minor, could acquire a domicile of choice.

Jacobs, in his Law of Domicile, Section 231, states:

> "The rule of disability has, in this country, been frequently stated, probably from an abundance of caution, as applicable to *unemancipated* minors, and in settlement cases it has been held that an emancipated minor may acquire a settlement for himself. But the latter doctrine is a legacy of the English law of pauper settlements into which the doctrine of domicil does not enter, and which rests upon its own peculiar grounds, largely statutory. These cases are therefore not authorities even for the doctrine that an emancipated minor may change his municipal domicil; much less can they have any weight in determining the question of his capacity to change his national or *quasi*-national domicil. Emancipation, as understood in this country, relates mainly to the right of the minor to acquire a settlement for himself, and to his right to receive and dispose of his own earnings, and is not to be understood to clothe him with any legal capacity, except such as is actually necessary for his maintenance and protection, and, if married, for the maintenance and protection of his family."

This is the common law rule which is in effect in Missouri, since no Missouri statute has changed it and since no Missouri court has ruled otherwise. This rule has found expression in *Delaware L. & W. R. Co.* v. *Petrowsky, supra,* where the Second Circuit held that an emancipated minor could not acquire a new domicile. To the same

effect is *Gulf C. & S. F. R. Co.* v. *Lemons, supra.* See also, *Bjornquist* v. *Boston & A. R. Co., supra,* and *Ex Parte Petterson,* 166 Fed. 536.

We have therefore established that under the common law as adopted and in force in Missouri, no minor whose parents are living can acquire a domicile of choice. The Circuit Court of Appeals for the Eighth Circuit recognized that the common law rule had not been changed in Missouri, because it says in its opinion: "There are no Missouri decisions directly on the point." Since no Missouri decisions have changed the common law rule, the common law rule remains the law of Missouri, because, as said in *Davis* v. *Stouffer, supra*:

> "It may safely be said that the courts of this country are not under any obligation to follow the mutations of decisions or new views announced in England as to wha twas the law of that country."

This pronouncement was by the Kansas City Court of Appeals, one of the courts of last resort in Missouri. If changes made in England to the common law of England cannot affect the common law of Missouri, then, by the same reasoning, changes in the common law made by other states or by federal courts in the common law, cannot change the common law of Missouri. The common law is and remains as it was, in Missouri.

In our case, the Circuit Court of Appeals concedes in its opinion that it does not decide our case under the common law of Missouri. It concedes that it decides our case on what it terms "modern authorities," on departures from the common law of Missouri, not as yet sanctioned by any Missouri courts. In so deciding our case, the Circuit Court of Appeals refused and failed to apply the common law of Missouri as we have shown it

to be, and so fell into grave error, error which has been condemned by this Court in the very recent cases of *Erie R. Co.* v. *Tompkins,* and *Magnolia Petroleum Co.* v. *Hunt.*

In *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, certiorari was granted on the very ground for which we here contend, that the Circuit Court of Appeals disregarded the common law rule of Pennsylvania, which was applicable, in reaching its decision. This Court said:

> "Because of the importance of the question whether the Federal Court was free to disregard the alleged rule of Pennsylvania common law, we grant certiorari (l. c. 71).
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> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state (l. c. 78).
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> * * * * * * *
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> "The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold, this was error, the judgment is reversed, etc." (l. c. 80.)

To the same effect is *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 168, in which this Court said:

> "The law of a state is embodied as well in its common law rules as in its statutes. * * * The extent to which it shall apply in its own courts a rule of law of another forum is itself a question of local law of the forum." (l. c. 445.)

The Circuit Court of Appeals for the Eighth Circuit fell into the exact error which was recognized in *Magnolia.*

It did not apply the common law of Missouri. It did not even apply the general law. It applied a departure from the common law and from the general law by deciding the case on "modern authorities," authorities which have not as yet been recognized by the Missouri courts. Whether or not those authorities are to receive recognition in Missouri is a matter solely for the courts of Missouri, and we respectfully urge that the Circuit Court of Appeals committed plain error in undertaking to forecast changes in the common law of Missouri which it believed those courts would make, and we urge that the Circuit Court of Appeals was in error in changing the common law rule of Missouri, as it does by its opinion.

Plain error has been committed against your petitioner. The same important question is here present as was present in *Erie R. Co. and in Magnolia Petroleum Co., supra.* Not only is the question of the application of local law important, but the question of jurisdiction is also present and constitutes an additional important reason for allowance of the writ for which we respectfully pray.

We have shown above that under the common law as in force in Missouri, even an emancipated minor cannot acquire a domicil of choice. We did not think the question of emancipation was material to decision below, but it was tendered by respondent, and the District Court, in its opinion (Appendix "A") found, as a matter of fact, that complete emancipation was not shown. The Circuit Court of Appeals brushed aside this finding and held that the record showed complete emancipation as a matter of law.

We shall here seek to show that in so ruling, that court disregarded not only the common law of Missouri, but a statute of our state.

As early as 1887, Jacobs, in his "Law of Domicil," Sec. 231, *supra,* noted that the courts were even then being troubled by the term "emancipation," and states:

> "Emancipation, as understood in this country, relates mainly to the right of the minor to acquire a settlement for himself, and to his right to receive and dispose of his own earnings, and is not to be understood to clothe him with any legal capacity except such as is actually necessary for his maintenance and protection, and, if married, for the maintenance and protection of his family."

That Jacobs properly defined "emancipation," and its effect, as used in this country, is born out by latest authority, viz:

27 Amer. Jur., Infants, p. 749:

> "The fact that an infant's father has emancipated him by giving up his right to the infant's services does not affect the validity of the infant's contracts or liabilities, with the exception of the infant's liability for necessaries furnished to him. Moreover, except for the effect of marriage as an emancipation upon the parent's rights to the infant's earnings and the parent's duty of support and except for the infant's liability for necessaries, the marriage of an infant does not affect the status of infancy or the disabilities incident thereto, including the infant's incapacity to make a contract which is not voidable."

Judge Reeves, an able Missouri lawyer, who formerly graced its Supreme Court, and who has graced the federal bench in Missouri for over twenty years, thoroughly familiar with Missouri law, in his study of the case noted

the difficulty which courts were having with "emancipation," saying:

> "It appears that the courts have been disposed to use the word 'emancipation' in relation to those cases where the parent sought to claim the wages of the minor. The word as a rule has been ineptly used."

The Circuit Court of Appeals used the word "emancipation" ineptly and contrary to its common law meaning and usage. This is proven by the fact that the Circuit Court of Appeals, while relying on the rule announced in Sec. 31, Restatement of Conflict of Laws, completely overlooked the limitation placed on the rule by the authors, in their definition of "emancipation," the true meaning, and the only meaning to be used in relation to change of domicil. The Restatement says, Rule 31, Comment (A):

> "An emancipated child, for the purposes of this section, means a child arriving at years of discretion, whose legal relations with his parent arising out of tutelage have been completely dissolved by the law of their domicil. The determination of the circumstances under which a child is emancipated is not within the scope of the restatement of this subject."

The crux of the definition is "legal relations with his parent arising out of tutelage." Tutelage is the common law right of the parent to the care and custody of his child.

Far from impairing that common law right, Missouri has reaffirmed and implemented it through Secs. 374, 375, R. S. Mo. 1939, l. M. R. S. A., p. 674, 681.

By Section 374, it is provided that:

> "all persons of the age of 21 years shall be considered of full age for all purposes • • • and until

that age is attained, they shall be considered minors; * * *."

Section 375 provides:

> "* * * the father and mother, with equal powers, rights and duties, while living, and in the case of the death of either parent, the survivor * * * shall be the natural guardian * * * of their children, and have the custody and care of their persons, education and estates; * * * The parents of such minor child * * * acting as such natural guardian * * * shall be entitled to receive and collect the earnings of such minors until they reach their majority and be liable for their support to the extent of such earnings; * * *."

Under this law, Judge Reeves said, it is held without exception that the natural guardian or a minor is entitled to the custody and care of such minor unless it be established that the parent is incompetent or unfit to have the custody and exercise control over him, citing *In re Smith,* 197 Mo. App. 200, l. c. 205; *State ex rel.* v. *Tincher,* 258 Mo. 1, l. c. 13, 166 S. W. 1028.

Missouri has no statutes which provide for emancipation of minors. Therefore, there can be no complete emancipation of minors in Missouri, as that term is properly to be used and understood on the question of the domicile of a minor, because the legal relations with the parent arising out of tutelage cannot be destroyed while minority continues and while the parent is fit and competent to care for the minor.

Judge Reeves reaches the same conclusion. He discusses a number of Missouri cases which deal only with the right of a minor to his own wages, or the liability of a parent for necessities furnished to a minor who has left home, cases in which the term "emancipation"

is used, as in 27 Amer. Juris., *supra,* but which are not cases of true emancipation and which Judge Reeves concludes are cases in which only limited manumissions are shown. All of the Missouri cases on the subject referred to in the opinion of the Circuit Court of Appeals are likewise cases of limited manumissions only and not cases holding that complete emancipation can or does exist in Missouri.

It is conceded that respondent is a minor. The record shows that his mother is his sole surviving parent. The record does not show that she is an unfit person to have the care, custody and control of the minor. By common law of Missouri, and by statute of Missouri, the relationships of parent and child arising out of tutelage continue as a matter of law on this record.

We respectfully urge that the Circuit Court of Appeals erred in holding that complete emancipation was shown as a matter of law on the record, because the Missouri law knows no such complete emancipation. Ineptly using the term "emancipation," the court ruled this issue on the law of foreign jurisdictions and was in error, as held in *Erie R. Co.* v. *Tompkins* and *Magnolia Petroleum Co.* v. *Hunt, supra,* and further ground for allowing the writ of certiorari prayed for appears.

In the preceding section of this brief, we pointed to the true meaning of "emancipation" as here involved, appearing in the Restatement of Conflict of Laws:

> "An emancipated child, for the purpose of this section, means a child arriving at years of discretion, whose legal relation with his parents arising out of tutelage have been completely dissolved by the law of their domicile."

The Missouri courts have said, *Brosius* v. *Barker*, 154 Mo. App. 657, l. c. 662:

> "Complete emancipation is an entire surrender of all rights to the care, custody and earnings of the child, as well as a renunciation of parental duties. • • • And the test to be applied is that of the preservation or destruction of the parental and filial relations."

Such a renunciation must be voluntary and must be intended, because the courts have held that in determining whether a child has been emancipated, the intention of the parent governs.

Donk Bros. Coal Co. v. *Retzloff*, 229 Ill. 194;
Evans v. *K. C. Bridge Co.*, 212 Mo. App. 101, 247 S. W. 213;
Memphis Steel Const. Co. v. *Lister*, 138 Tenn. 307, 197 S. W. 902, L. R. A. 1918 B 406;
46 C. J., p. 1342, Parent and Child, Secs. 190, 192.

With these principles before us, we approach the record. The minor respondent left home without taking any extra clothes or his belongings with him, to find work at Kansas City. He had registered for the draft and was about to be inducted (16). His mother had nothing to do with his leaving home, she did not ask him to leave, nor did she want him to leave home (17). After leaving, her son kept writing to her (18-20).

On this evidence, it is clear from the memorandum opinion filed in the case by Judge Reeves, that there was no destruction of the parental and filial relations. The District Court so found. The mother did not consent to the boy's leaving home. The District Court so found. If she did not consent to his leaving home, and did not want him to leave home, and did not ask him to leave home,

then she did not intend to emancipate the boy. It is clear that she did not intend that the maternal and filial relations be destroyed.

Judge Reeves did not make or file any separate findings of fact, as such, but his memorandum opinion shows that he found the above facts and that he found, as a matter of fact, that complete emancipation was not shown by the record. Since his opinion clearly indicates the basis for the court's decision, the opinion may be treated as findings of fact, under the authority of *Hazeltine Corp.* v. *General Motors Corp.*, (C. C. A. 3) 131 F. (2d) 34.

The evidence to which we have pointed clearly substantiates the District Court's finding and no clear error appears, and so, the Circuit Court of Appeals erred in setting aside the court's finding. Rule 52(A), Federal Rules of Civil Procedure; *Reinstine* v. *Rosenfield,* (C. C. A. 7) 111 F. (2d) 892.

Conclusion.

We believe we have shown, by applicable authority, that the Circuit Court of Appeals for the Eighth Circuit failed to rule the issue of domicile according to the common law of Missouri, and so, under the holding of *Erie R. Co.* v. *Tompkins,* an important question has arisen and for which the jurisdiction of this Court may be invoked under Rule 38 of this Court. The opinion of the Circuit Court of Appeals also conflicts with the holding of this Court in *Magnolia Petroleum Co.* v. *Hunt.* The opinion of the Circuit Court of Appeals conflicts with the holding of this Court in *Lamar* v. *Micou.* The opinion is in conflict with *Delaware, L. & W. R. Co.* v. *Petrowsky,* by the Circuit Court of Appeals, Second Circuit, on the same subject matter. We sincerely believe that grave error has been committed against petitioner and we

respectfully urge that the importance of the questions involved, and the clear error shown, justify the allowance of the writ of certiorari for which we pray.

Respectfully submitted,

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